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EUROPEAN LEGAL METHODOLOGY

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§24. FRANCE

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CONTENTS

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I. A LEGAL SYSTEM IN TRANSITION

1. The French legal system is in a transition, brought on by the approximation of European laws, on the one hand, and by the admission of the constitutional complaint (*question prioritaire de constitutionnalité*) introduced in 2008, on the other. Both of these developments are challenging the traditional models of (judicial) reasoning and are bringing about a transformation of the roles ascribed to the courts of the French legal system with regard to other organs of the state such as the executive and the legislature. This development[1] is not yet complete, which is why at present only certain trends may be discernible. Worth stressing here is the peculiar approach to European legal methodology in the French doctrine. In the process of adjusting European private law, French doctrine and jurisprudence tend to concentrate particularly on the questions of jurisdictional competence and relations between different sources of law, whereas the German discourse centres on methodological questions of the application of law (see para. 9).

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1 *Ordonnance* No. 2016-131 of 10 February 2016 has implemented a thorough reform of the French law of contract (that entered into force on 1 October 2016) and has brought about a complete reformulation of the relevant chapters of the French Civil Code that had been unchanged since 1804. On the content of the reform see especially A. Bénabent/L. Aynès /O. Deshayes (eds.), 'Colloque: La réforme du droit des contrats: quelles innovations? (Paris, 16 février 2016)', *Revue des contrats* 2016 (special edition April 2016) with further reference. An English translation of the new provisions (by J. Cartwright/B. Fauvarque-Cosson/S. Whittaker) available at http://www.textes.justice.gouv.fr/art_pix/THE-LAW-OF-CONTRACT-2-5-16.pdf.

II. FOUNDATIONS: THE NATIONAL LEGAL AND JUDICIAL SYSTEM

2. Although France has had 15 different Constitutions since the Revolution of 1789,[2] stability has remained the hallmark of French state institutions and courts. The revolutionary principle of separation of powers in accordance with a strict distinction between the judiciary branch (civil and criminal) and the administrative branch of jurisdiction, the latter being regarded as a privilege of the Administration,[3] still strongly divides the national court system. Conflicts in jurisdiction between the two branches can only be solved by the *Tribunal des Conflits*,[4] a judicial body consisting of an equal number of judges from both high courts, i.e. the *Cour de cassation*, which is responsible for the supervision of ordinary jurisdiction and the *Conseil d'État*, which monitors administrative courts and decides on the application of administrative law[5] in the lower courts, thus guaranteeing the uniformity of jurisdiction on every level of the legal process.[6] Both High Courts have the power to dismiss (*rejet*) an appeal against or to overturn (*cassation*) the judgment of the lower instances and if necessary even to re-submit the case for reconsideration (*renvoi*) to a lower instance. Even though both of these courts possess an enormous amount of power, manifesting itself through the abundance of judicial institutes created by the judges and through the frequency with which these courts introduce unanticipated reversals (*revirements*), they both describe themselves, keeping up with the revolutionary tradition, as 'the mouth of the law' (*bouche de la loi*) and postulate a rigorous subjection to the law.[7]

3. The constitutional reform of 23 July 2008 changed these traditional structures and to some extent forced them open.[8] One initial development, important in terms of the structure of the legal system as a whole, concerned the role of the

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2 See J. Godechot/H. Faupin, *Les Constitutions de la France depuis 1789* (Paris: Flammarion, 2006).

3 See Act of 16–24 August 1790 on the Judicial Organisation: 'Judicial functions are distinct and shall always remain separate from administrative functions'; on the further development see B. Pacteau, *Le Conseil d'État et la fonction de la justice administrative française au XIXe siècle* (Paris: PUF, 2003).

4 See E. Picard/G.A. Bermann, in E. Picard/G.A. Bermann (eds.), *Introduction to French Law*, 57 (59 et seq.); T. Debard/S. Guinchard/G. Montagnier/A. Varinard, *Institutions juridictionnelles*, 11th edn. (Paris: Dalloz, 2013).

5 See M.-N. Jobard-Bachellier/X. Bachellier/J. Buk Lament, *La technique de cassation*, 8th edn. (Paris: Dalloz, 2013).

6 M.-N. Jobard-Bachellier/X. Bachellier/J. Buk Lament, n. 5 above.

7 On the fictional character of this assumption, see N. Molfessis, 'Loi et jurisprudence', *Pouvoirs* No. 126, 87–100; on the recent debasement of statutes see J.-C. Bécane/M. Couderc/J.-C. Hérin, *La loi*, 2nd edn. (Paris: Dalloz, 2010).

8 Constitutional Act No. 2008-724 of 23 July 2008, JORF 24 July 2008, p. 1890/11895, NOR: JUSX0807076L.

law (*loi*): the Constitution of the Fifth Republic (1958) was originally dedicated to eliminating the instability that had plagued the formation of governments under the Third and Fourth Republics. In order to achieve governmental stability the right of parliamentary scrutiny with respect to the government was limited (so-called *parlementarisme rationalisé*) and at the same time, the supremacy of the law was broken in favour of the executive ruling.[9] In particular, the government may seek authorisation to implement specific legislative proposals by means of ordinance (*ordonnance*) rather than legislation (Art. 38 Const.).[10] This approach has had important implications in particular with respect to the transposition of European Directives, since the *ordonnance* is often used to transfer Directives to French law, especially in cases where the French legislature got behind schedule with their implementation.[11] The constitutional reform of 23 July 2008 reinforced the importance of Parliament to the extent that henceforth explicit ratification of the *ordonnance* by Parliament is required if the *ordonnance* is to have the force of law after its enactment.[12] That in turn has also strengthened the rights of the Parliament vis-à-vis the government, helping to achieve a better balance between the constitutional institutions (*réequilibrage des institutions*).[13]

4. The constitutional reform of 2008 also initiated significant changes for the French court system by introducing an *ex post* review of the constitutionality of laws.[14] Since then, Art. 61-1 Const. states that: 'If, during proceedings before a court of law, it is claimed that a legislative provision infringes the rights and freedoms guaranteed by the Constitution, the matter may be referred by the *Conseil d'État* or by the *Cour de cassation* to the *Conseil constitutionnel*.'[15]

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9 For an overview see F. Hamon/M. Troper, *Droit constitutionnel*, 36th edn. (Paris: LGDJ, 2016) paras. 465 (on *parlementarisme rationalisé*) and paras. 755–761 (on legislation by way of *ordonnances*).

10 Art. 38 Const. (original version): '(1) In order to implement its programme, the Government may ask Parliament for authorisation, for a limited period, to take measures by Ordinance that are normally the domain of statute law'; see L. Bach, *Répertoire de droit civil*, 1 (para. 46) with further references.

11 See e.g. Act No. 2004-237 of 18 March 2004, JORF No. 67 of 19 March 2004, p. 5311, NOR: MAEX0300214L; Act No. 2001-1 of 3 January 2001, JORF No. 3 of 4 January 2001, p. 93, NOR: MAEX0000132L; L. Leveneur, 'Quarante-six transpositions par ordonnances: où va-t-on?', *Contrats, concurrences, consommation – Février 2001 No. 2*, 3–8. It should be noticed that the reform of the law of contracts has also been put into force via an *ordonnance*.

12 Insertion of a third sentence in Art. 38(2) Const.: 'They (Ordinances) may only be ratified in explicit terms'.

13 The deliberations of the *Comité de réflexion* are available at http://www.ladocumentationfrancaise.fr/var/storage/rapports-publics/074000697/0000.pdf.

14 Regarding the impact, see E. Cartier, *La QPC, le procès et ses juges* (Paris: Dalloz, 2013), in which the '*mutation du dualisme juridictionnel*' is particularly discussed.

15 On the application of this article see the English presentation by O. Dutheillet de Lamothe, available at http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/

Contrary to the previous legal situation, in which laws were examined in respect to their constitutionality only before their promulgation, the new development provides a possibility (for the first time in French legal history) to review the constitutionality of laws that have already been adopted. A court, if it considers that a law is unconstitutional, must refer the question to the highest court within its own judicial branch. The highest court within the respective branch, i.e. the *Cour de cassation* or the *Conseil d'État*, in turn submits the law to the *Conseil constitutionnel* (Constitutional Council) for consideration. It has been emphasised that through this mechanism both high courts have obtained a new role within the French legal order. In fact, even if the *Cour constitutionnel* is now intended to be a real constitutional court,[16] it is up to the courts of the civil and administrative branch to control the constitutionality of a statute. Therefore, they can be called 'ordinary constitutional judges' (*juges constitutionnels de droit commun*),[17] a denomination that implies that they are no longer entirely 'subjected' to the law (see above, para. 2) but may question its validity with regard to the constitutional conformity. This evolution of the French legal system has had an important predecessor in the ECHR whose decisions have been used by French courts of both jurisdictions to legitimise the non-application of a national statute.[18] Hence, the 'constitutionalisation' of the French legal system is nowadays twofold: it is rooted in both domestic and transnational law.

5. The law implementing this reform of the French Constitution (*loi organique*) describes this question as the 'primary question of constitutionality' (*question prioritaire de constitutionnalité*, the so-called *QPC*).[19] The intention of the legislator behind the introduction of such a qualification was to ensure that the courts examine and decide the question of constitutionality before proceeding to the examination of conformity with European law. This approach was initiated in order to guarantee a constitutional control and to prevent the courts from circumventing the constitutional issue by falling back on the mere examination

documentation/contributions-et-discours/2012/a-french-legal-success-story-the-question-prioritaire-de-constitutionnalite.115542.html.

16 On the binding force of the decisions of QPC see C.E. 13 May 2011, Mme M'Rida, n° 316734, also in: B. Mathieu/D. Rousseau (ed.), *Les Grandes décisions de la question prioritaire de constitutionnalité*, (Paris: L.G.D.J. 2013), 207–216.

17 A. Roblot-Troizier, *La QPC, le Conseil d'État et la Cour de cassation*, Nouveaux Cahiers du Conseil constitutionnel No. 40 (Dossier: Le Conseil constitutionnel: trois ans de QPC) – juin 2013, available at: http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/nouveaux-cahiers-du-conseil/cahier-n-40/la-qpc-le-conseil-d-etat-et-la-cour-de-cassation.137429.html.

18 See (for the latest) S. Guinchard/F. Ferrand, 'Une chance pour la France et le droit continental: la technique de cassation, vecteur particulièrement approprié au contrôle de conventionnalité', *Rec. Dalloz* 2015, 278.

19 Act No. 2009-1523 of 10 December 2009, JORF No. 0287 of 11 December 2009, p. 21379, NOR: JUSX0902104L.

of the conformity of a French norm with European law (see below, para. 18).[20] The introduction of the *QPC* is therefore the clearest sign that the role of the courts vis-à-vis the legislator is no longer limited to the role of 'the mouth of law', i.e. the application of law, but that the courts may also review the compatibility of laws with European law and since 2008 also with constitutional law.[21] At the same time, the *QPC* overcomes the traditionally strict separation between ordinary and administrative courts as constitutional issues are decided by the *Conseil constitutionnel* whose jurisdiction is binding for both judicial branches.[22] The *Cour de cassation* and the *Conseil d'État*, however, still retain a special authority over the lower courts, where constitutional reviews are concerned: both highest courts act as 'filters' for the submission of the *QPC* to the *Conseil constitutionnel* with no possibility for the claimants to appeal in this respect.[23]

6. Given the strong separation between different jurisdictions and the implied acknowledgment of their respective competences, the methodological implications of conflicts between different provisions have been attributed less importance in the French than in the German legal doctrine concerning implementation of European laws.[24] Still fundamental to the French legal method in private law is the methodological position of the '*libre recherche scientifique*' ('free scientific research') developed by *François Gény* in 1899.[25] According to *Gény*, the starting point of the application of law is its interpretation,[26] which covers both the application of a law of unambiguous wording and the study of the legislative intent of a legal text that is *prima facie* ambiguous.[27] The second

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20 See Art. 23-2(2) of Act No. 2009-1523 of 10 December 2009: 'In all events, the court involved must, when confronted firstly with arguments challenging the conformity of a statutory provision with the rights and freedoms guaranteed by the Constitution and secondly with the international commitments entered into by France, rule in priority on the matter of the transmission of the application for a priority preliminary ruling on the issue of constitutionality to the Council of the State or Court of Cassation.' On the background see L. Burgorgue-Larsen, 'Question préjudicielle de constitutionnalité et contrôle de conventionnalité', *RFDA* 2009, 787–799 (796).

21 For an overview see E. Dupic/L. Briand, *La question prioritaire de constitutionnalité, une révolution des droits fondamentaux* (Paris: PUF, 2013) esp. 45–49, 61–65, 154–161.

22 See Art. 23-2(1)(2) of Act No. 2009-1523 of 10 December 2009: 'Said provision has not previously been found to be constitutional in the holding of a decision of the Constitutional Council, except in the event of a change of circumstances.'

23 The *QPC* of the Court of cassation are available at: http://www.courdecassation.fr/jurisprudence_2/questions_prioritaires_constitutionnalite_3396/constitutionnalite_soumises_3641/.

24 See J.-S. Bergé, *L'application du droit national*, paras. 172–232.

25 See F. Gény, *Méthode d'interprétation et sources en droit privé positif*, vol. 2, 2nd edn. (Paris: LGDJ, 1919); on the ongoing impact of F. Gény today, see F. Terré, *Introduction générale au droit*, 9th edn. (Paris: Dalloz, 2012) paras. 552–554 with further references.

26 See F. Gény, n. 25 above, 74 et seq.; B. Frydman, *Le sens des lois* (Brussels: Bruylant, 2005) 488–490; on the legend of *école d'exégèse* see A. Bürge, *Das französische Privatrecht im 19. Jahrhundert*, 2nd edn. (Frankfurt am Main: Klostermann, 1995) 225–245.

27 See L. Bach, n. 10 above, 1 (para. 324–326).

type of legal application cannot be described as mere application of statutes, but rather consists of 'free' judicial ruling.[28] This ruling is 'free' only in the sense that the judge has to rule in the absence of a legal norm and therefore cannot found his opinion on a formal source of law. Yet, in contrast to the (German) *Freirechtsschule*, the court in its 'free scientific research' established by *Gény* has to prove an academic, which is to say objectified, approach to its own decision-making. This includes that the court has to examine, assess and disclose all matters of law and fact that are taken into consideration as arguments in the decision-making. The ruling should reflect and take into account the current social reality, which is why (according to *Gény*'s construct) courts may decide against the (historical) legislator's intention if necessary from a contemporary perspective.[29]

7. These two levels of application and determination, as established by *Gény*, can be defined on the basis of the provisions found in the French *Code civil* (CC). The first provision is the prohibition of denial of justice in Art. 4 CC.[30] According to this law, a judge who refuses to reach a verdict on the pretext of legislation being silent, obscure or insufficient may be prosecuted for violating the prohibition of denial of justice.[31] Where no unambiguous precept can be found, the courts are no longer interpreting the law (*interprétation*),[32] but rather determining the law according to 'free scientific research' (*libre recherche*).[33] The limits of this free judicial ruling are clearly drawn in Art. 5 CC, where it is stated, that 'judges are forbidden to decide cases submitted to them by way of general and regulatory provisions.'

8. Following *Gény*, a judge may, in the course of applying or determining the law, consider all other sources of knowledge in support of the solution of the case.[34] Therefore, courts are not limited to genuine sources of law. How this assertion

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28 See F. Gény, n. 25 above, 74–234; C. Jamin, 'Francois Gény d'un siècle à l'autre', in P. Jestaz/C. Thomasset/J. Vanderlinden (eds.), *François Gény, Mythe et réalité* (Montreal: Y. Blais etc., 2000) 25–28.

29 See F. Gény, *Méthode d'interprétation et sources en droit privé positif*, vol. 1, 2nd edn. (Paris: LGDJ, 1919) 222–226.

30 See J. Chevallier, 'L'interprétation des lois', in G. Fauré/G. Koubi (eds.), *Le titre préliminaire du Code civil* (Paris: Economica, 2003) 125–141. The provision has been left unchanged by the recent reform of French contract law, n. 1 above, but the rules on the interpretation of contracts have undergone a major reformulation, cf. articles 1188 to 1192 of the new law (in comparison with articles 1156 to 1157 of the old law).

31 Art. 4 CC: 'A judge who refuses to give judgment on the pretext of legislation being silent, obscure or insufficient, may be prosecuted for being guilty of denying justice' on which see F. Terré, n. 25 above, para. 352 et seq.

32 See A. Rieg, 'L'interprétation par le juge des règles écrites', *Travaux de l'Association Henri Capitant* vol. 29 (1978), 70–85.

33 See L. Bach, n. 10 above, 1 (para. 345 et seq.) with further references.

34 See F. Gény, n. 25 above, esp. 77–79 and 93–113.

can be maintained is disputed in the French legal doctrine. Taking Art. 12(1) *Nouveau Code de procédure civile* (NCPC) into consideration, which binds the courts to the law,[35] the issue is undoubtedly related to the difficulty associated with the term 'source of law', whose boundaries cannot be sharply drawn.[36] It has repeatedly been pointed out that it makes no difference for the result of an individual case, if a judge decides on the basis of a genuine or a sociological source of law.[37] The basis of legal validity in individual cases (see above Art. 5 CC, para. 9) is the judge's ruling, not the source of law consulted in making the decision.

9. According to this understanding of the judicial function, French doctrine sees the coexistence and cooperation of national private law and EU law not as a methodological problem of the application and interpretation of law, but primarily as an issue of coordinating different sources of law (see below, paras. 35–37). As a consequence, the requirement to apply European law – supranational law – with precedence over national law is considered to be a liberation of the French judiciary from the yoke of the legislator (see above para. 4 and below, para. 38). The change in the jurisdictional function of the judiciary brought about by Union law and the expansion of its competence under EU law, particularly with respect to the legislator, is at the heart of the French discussion of implementing European law (see below, paras. 30–34).

III. EUROPEAN UNION LAW AND NATIONAL (FRENCH) LAW

10. From the French point of view, the special competence of the CJEU with respect to Union law is in itself sufficient to depict the special position of EU law as compared to other international law: whereas the French courts were not authorised to interpret international treaties themselves until 1990 and 1995 respectively, but had to refer to the appropriate administrative authority (ministry) in order to receive a legal interpretation of the pertinent norm,[38] Community law was – and Union law is – subject to a CJEU monopoly, which has sole authority to interpret and reject it in application of Art. 267 TFEU. From this perspective, it is understandable that the national courts of France consider this subjection to another European court as a step forward in comparison to the obligatory referring to national administration. At the same time, the prolonged survival of

35 Art. 12 Abs. 1 NCPC: 'The judge settles the dispute in accordance with the law applicable thereto', on which see S. Guinchard/C. Chainais/F. Ferrand, *Procédure civile. Droit interne et droit de l'Union européenne*, 3rd edn. (Paris: Dalloz, 2012) paras. 507–510.

36 See J. Carbonnier, *Droit civil*, vol. 1 (Paris: PUF, 2004) 192–309.

37 See F. Terré, n. 25 above, paras. 197–200 (*doctrine*); paras. 360–362 (*jurisprudence*).

38 See C.E. 29 June 1990, *G.I.S.T.I.*, Rec. p. 171 which marks the end of this practice; for an overview of the former jurisprudence see A. Humbert, *La mutation de l'office du juge français*, para. 258; para. 273.

authentic interpretation (*interprétation authentique*)[39] and the strict separation of the jurisdictions of ordinary courts of law and administrative courts may explain the ease with which the CJEU's monopoly on jurisprudence is accepted in France: its authority is in accordance with the principle *eius est legem interpretari cuius est condere.*[40] The adoption of the teleological interpretation (*interprétation téléologique*) of Union law prescribed by the CJEU is therefore readily adopted by the French courts as a logical consequence of the separation of powers.[41] This dependence, from the legal viewpoint of the French courts, explains all the special features of Union law in comparison to other international law(s).

1. General Relation to International Law

11. For the integration of international law into the French legal system, the French Constitution of the Fifth Republic follows the traditional monism.[42] Art. 53 Const. declares that:

> Peace Treaties, Trade agreements, treaties or agreements relating to international organisations, those that bind states financially, those that change provisions of legal nature, those that affect the status of a person, those that affect the division, substitution or addition of territory, may be ratified or approved only by an Act of Parliament.[43]

The statute prescribed in this provision concerning the most important international laws regulates only the matter of ratification. Once properly implemented, treaties and agreements have immediate validity without any further act of transposition[44] and are self-executing (*autoexécutoire*). According to Art. 55 Const., international treaties and agreements occupy the second degree within the hierarchy of legislation, i.e. a lower level than the Constitution (*constitution*) but higher than the law (*loi*),[45] provided that they are also applied by the other party (*réserve de réciprocité*).[46]

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39 See only L. Bach, n. 10 above, 1 (para. 267 et seq., para. 324).

40 The phrase constitutes the foundation of the former jurisprudence, see C.E. 23 July 1823, *Veuve Murat, Comtesse de Lipoma*, Rec. p. 545 and C.E. of 3 September 1823, *Rougement*, Rec. p. 575.

41 On teleological interpretation see F. Terré, n. 25 above, para. 554.

42 See P.-M. Dupuy/Y. Kerbrat, *Droit international public*, para. 430 and paras. 441–443 on the dualistic tendencies in jurisprudence.

43 Art. 53 Const.: 'Peace Treaties, Trade agreements, treaties or agreements relating to international organisations ... may be ratified or approved only by an Act of Parliament. They shall not take effect until such ratification or approval has been secured.'

44 See F. Terré, n. 25 above, para. 260.

45 Art. 55 Const.: 'Treaties or agreements duly ratified or approved shall, upon publication, prevail over Acts of Parliament, subject, with respect to each agreement or treaty, to its application by the other party.'

46 See F. Terré, n. 25 above, para. 260 et seq.; see also P.-M. Dupuy/Y. Kerbrat, n. 42 above, para. 430: '*particulièrement maladroit*'.

12. According to Art. 54 Const., the examination of the constitutionality of an international treaty is limited to an *a priori* view. Before ratification and on a referral from the President of the Republic, from the Prime Minister or from the President of one of the Houses, the *Conseil constitutionnel* examines whether the treaty or agreement to be ratified is consistent with the Constitution.[47] If the *Conseil constitutionnel* opines that the treaty is incompatible with the Constitution, the latter must be amended. The Constitution of the Fifth Republic was amended in this manner to facilitate the adoption of the Maastricht and Lisbon Treaties.[48] Once the international treaty has been ratified, however, it can no longer be reviewed in terms of its constitutionality.[49] This indefeasibility of international agreements could be regarded in contrast with the possibility of controlling the conformity of domestic statutes with the constitution even after their promulgation.[50] It reflects, however, the generally favourable attitude of the French constitution to international law.

13. By contrast, the compatibility of laws with international treaties and agreements – their so-called 'conventionality' (*conventionnalité*) – is monitored by the ordinary and administrative courts.[51] But in this area both judicial branches traditionally felt bound by the legislator's intention,[52] so that they avoided controlling the conventionality of laws that had been enacted after the ratification of the international agreement and that infringed it (*théorie de la loi-écran*, below, para. 17). Therefore, despite the hierarchical primacy of international agreements, the courts traditionally applied the *lex posterior* rule.[53]

2. Relation to Union Law

14. With respect to European law the *Cour de cassation* abandoned the application of the *lex posterior* rule as early as 1975, in the *Cafés Jacques Vabre*

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47 Art. 54 Const.: 'If the Constitutional Council, on a referral from the President of the Republic, from the Prime Minister, from the President of one or the other Houses, or from sixty Members of the National Assembly of sixty Senators, has held that an international undertaking contains a clause contrary to the Constitution, authorisation to ratify or approve the international undertaking involved may be given only after amending the Constitution'.

48 See F. Hamon/M. Troper, n. 9 above, paras. 705–707.

49 On the organisation of the court see J. Dutheil de la Rochère, 'European Union Law', in E. Picard/G.A. Bermann (eds.), *Introduction to French Law* (Alphen aan den Rijn: Wolters Kluwer, 2012) 36–40 with further references.

50 On others problems of Art. 54 see also F. Hamon/ M. Troper n. 9 above para. 780.

51 Fundamental in this respect Cons. Const. Dec. 74-54, 15 Jan. 1975 *IVG, interruption volontaire de grossesse*. With this decision the *Conseil constitutionnel* refused to control the conformity of a statute with the French constitution also with regard to European law. An English translation is available at http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank_ mm/anglais/a7454dc.pdf.

52 See P.-M. Dupuy/Y. Kerbrat, n. 42 above, para. 440.

53 See P.-M. Dupuy/Y. Kerbrat, n. 42 above, para. 442 et seq.; F. Hamon/M. Troper, n. 9 above, para. 789.

decision, in which the *Cour de cassation* also recognised the primacy of Union law over national law (see below, para. 20). The decision referred to the question whether the company *Cafés Jacques Vabre*, which imported instant coffee from the Netherlands (to France), could invoke the interdiction of customs of Art. 95 EC Treaty of 1957 (now Art. 30 TFEU), although the French legislator in its statute of 1966 had prescribed such customs for import. Following the existing case law at that moment, the *lex posterior* rule would have had to be applied, i.e. the national statute would have prevailed over the international treaty. Yet, the *Cour de cassation* overturned its own precedent:[54]

> But considering that the Treaty of 25 March 1957, which has been given precedence over the laws by the Constitution, has created an own legal system which is integrated into the legal systems of the member states ..., the *Cour d'appel* decided in legal conformity to apply Art. 95 of this Treaty and not Art. 265 of the statute on customs, even if this statute has been enacted afterwards.

15. The administrative court, i.e. the *Conseil d'État*, held on to the traditional position until 1989 (*Nicolo*), when the judges recognised the primacy of Union law (then Community law) over French law.[55] However, having admitted the primacy of Union law, the *Conseil d'État* also quickly granted it to secondary Union law.[56] The special status of Union law in comparison with international treaties has been embedded into the constitution with the adoption of the Maastricht Treaty in 1992. The law No. 92-554 of 25 June 1992 introduced a special chapter into the French Constitution (presently Chapter XV 'On the European Union') thus laying the constitutional foundation for the integration of European law within the French legal order.[57]

16. There is still some uncertainty with respect to the relationship between French constitutional law and Union law.[58] The *Conseil constitutionnel*, as early as 1975, stated that the inconsistency of a legal rule with Community law does not lead to its unconstitutionality (see above, para. 13). This position has not changed, even when French participation in the European Union became a constitutional matter, with the introduction of Art. 88-1 Const. in connection

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54 Cass. mixte 24 May 1975, *Cafés Jacques Vabre*, Bull. No. 4; for further references see G. Le Tallec, 'La cour de cassation et le droit communautaire', in S. Rials (ed.), *L'Europe et le droit: Mélanges en hommage à J. Boulouis* (Paris: Dalloz, 1991) 368–370 and F. Chaltiel, *La souveraineté de l'état et l'Union européenne, l'exemple français* (Paris: LGDJ, 2000) 312 et seq.

55 C.E. Ass. 20 October 1989, *Nicolo*, Rec. p. 190; on further development see C.-E. Delvallez, *Le juge administratif et la primauté du droit communautaire* (Paris: l'Harmattan, 2011).

56 See C.E. 24 September 1990, *Boisdet*, Rec. p. 251; C.E. Ass. 28 February 1992, *S.A. Rothmans int. France, S.A. Philips Morris France*, Rec. p. 78/81.

57 Nowadays Art. 88-1 to 88-7 Const. An English translation is available at http://www.conseil-constitutionnel.fr/conseil-constitutionnel/english/constitution/constitution-of-4-october-1958.25742.html.

58 For an overview see F. Hamon/M. Troper, n. 9 above, para. 711.

with the ratification of the Treaty of Maastricht.[59] According to all French branches of jurisdiction the question of unconventionality according to Union law (*contrôle de conventionnalité*) and the question of unconstitutionality (*contrôle de constitutionnalité*) must be examined separately and fall under the jurisdiction of different courts: whereas the ordinary and administrative courts have jurisdiction over the compliance of national law with Union law, the Constitutional Court (*Conseil constitutionnel*) is in charge of controlling the constitutionality of national statutes.[60]

3. *Changes Brought About by the Introduction of the Specific Judicial Review in 2008*

17. The options for the courts to review laws were greatly expanded with the introduction of the specific constitutional complaint in 2008 (above, para. 4). In particular, this constitutional reform deprived the theory of the 'law shield' (*théorie de la loi-écran*) of its basis (above, para. 13). In fact, the introduction of a judicial complaint against unconformity of law with the Constitution allows an examination of the constitutionality of the law in any legal instance. To set this in motion the lower courts have to refer to the *Cour de cassation* and the *Conseil d'État*, which serve as a kind of 'filter' and decide with discretional power if the referral to the *Conseil constitutionnel* is warranted (see above, para. 4). At the same time the relationship between constitutionality of the provision and conformity with Union law is now open to question: can the Constitution be used as a kind of 'shield' (*écran*), which cannot be broken for the benefit of Union law?[61]

18. This issue reached its peak when the statute substantiating the Constitution (*loi organique* no. 2009-1523 v. 10.12.2009) determined that the *QPC* should take precedence over the preliminary ruling of Luxembourg (above, para. 5).[62]

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59 Art. 88-1 Const. (after the Treaty of Lisbon): 'The Republic shall participate in the European Union constituted by States which have freely chosen to exercise some of their powers in common by virtue of the Treaty on European Union and of the Treaty on the Functioning of the European Union, as they result from the treaty signed in Lisbon on 13 December, 2007.' On the interpretation see L. Favoreu et al., *Droit constitutionnel*, 18th edn. (Paris: Dalloz, 2016) para. 1194.

60 For details see A. Ondoua, *Etude des rapports entre le droit communautaire et la constitution en France. L'ordre constitutionnel comme guide au renforcement de l'intégration européenne* (Paris: L'Harmattan, 2001) 63–82.

61 Art. 61-1 Const.: 'If, during proceedings in progress before a court of law, it is claimed that a legislative provision infringes the rights and freedoms guaranteed by the Constitution, the matter may be referred by the Council of the State or by the Court of Cassation to the Constitutional Council which shall rule within a determined period.'

62 Art. 23-2(2): 'In all events, the court involved must, when confronted firstly with arguments challenging the conformity of a statutory provision with the rights and freedoms guaranteed

The lower courts were required to primarily refer to the *Conseil constitutionnel* and to raise the question of constitutionality of the national legal provision. Only thereafter were they allowed to refer to the CJEU in case of doubts concerning conformity of the national statute with Union law.[63] The argument for such a 'chronological' priority of the constitutional control was that the unconstitutionality of a provision would lead to its invalidity *erga omnes*, while unconformity with Union law would be limited to an *inter partes* effect.[64] In stating the priority of its own constitutional control, the French legislator did not take into account that the provision could be contrary to Union law. In addition, the legislator failed to notice that not every unconstitutional norm is void but that the *Conseil constitutionnel* makes frequent use of interpretative reservations (*réserves d'interprétation*) stating that a provision can 'still be in conformity with the Constitution' if interpreted in a specific way.[65] Therefore, the court that doubts the constitutionality of a statute will nevertheless be obliged to apply the law, which then will raise the question of its conventionality. A similar problem arises from procedural aspects: a court can review the constitutionality of a provision only at the complaint of a party, whereas the conformity with European law must be considered *ex officio*.[66]

19. In view of the conflict between the priority of the *QPC* and Union law, the *Cour de cassation* in 2010 decided to hand over the question of conventionality of the new statute to the CJEU.[67] The referred question in the *Melki et Abdéli* case of the *Cour de cassation* read:

> Does Article 267 [TFEU] preclude legislation such as that resulting from Article 23-2, paragraph 2, and Article 23-5, paragraph 2, of Order No 58-1067 of 7 November 1958, created by Organic Law No 2009-1523 of 10 December 2009, in so far as those

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by the Constitution and secondly with the international commitments entered into by France, rule in priority on the matter of the transmission of the application for a priority preliminary ruling on the issue of constitutionality to the Council of the State or Court of Cassation.' The same must be said about the two highest courts referring cases, see Art. 23-5(2); see J.-L. Warsmann, 'Rapport au nom de la commission des lois constitutionnelles sur le projet de loi organique (n° 1975) relatif à l'application de l'article 61-1 de la Constitution', XII législature, 4 November 2009, 24 and 26, available at http://www.assemblee-nationale.fr/13/rapports/r0892.asp.

63 On the reasons see J.-L. Warsmann, n. 62 above, 6 et seq.

64 See F. Fillon/R. Dati, 'Projet de loi organique relatif à l'application de l'article 61-1 de la Constitution, XIII législature, 8 April 2009', 5, available at http://www.assemblee-nationale.fr/13/projets/pl1599.asp.

65 A. Viala, 'De la puissance à l'acte: la QPC et les nouveaux horizons de l'interprétation conforme', *Revue de droit public* 2011, 965–996.

66 In detail see L. Burgorgue-Larsen, n. 20 above, 787–798 (esp. 796–798).

67 The question was whether Art. 78-2(4) *Code de procédure pénale* was compatible with Art. 67 Lisbon Treaty, see N. Molfessis, 'La résistance immediate de la Cour de cassation à la QPC', *Pouvoirs* No. 137, 83–99.

> provisions require courts to rule as a matter of priority on the submission to the *Conseil constitutionnel* of the question on constitutionality referred to them, inasmuch as that question relates to whether domestic legislation, because it is contrary to European Union law, is in breach of the Constitution?[68]

This question for a preliminary ruling was intended to resolve the conflict between Union law and the priority of the *QPC*. This intention can be seen especially in the fact that the reasoning of the *Cour de cassation* referred to the obsolete view that through Art. 88-1 Const. the conformity of national laws to the Lisbon Treaty had become a constitutional requirement (above, para. 16).[69] In any case, the ruling had the desired effect: the CJEU asserted that Art. 267 TFEU did not preclude national legislation which provides for the review of constitutionality as a matter of priority, first, as long as it was possible for national courts at any moment in the proceedings they deem appropriate to refer any question to the Court of Justice for a preliminary ruling, secondly, to adopt any measures necessary to ensure provisional judicial protection of the rights granted under the legal system of the Union, and thirdly, to leave the debatable national legislative provision unapplied, if it was considered contrary to EU law.[70] As long as these three conditions are met, the French system of the *QPC* remains consistent with Union law.[71]

20. The solution of the CJEU concerning the relationship between the *QPC* and Union law follows a line of reasoning that had been prefigured by the *Conseil constitutionnel*:[72] in its decision of 12 May 2010, which dealt with the constitutionality of the legislation on opening up competition and regulating the Internet gambling sector,[73] the *Conseil constitutionnel* first found that its competence to determine the unconstitutionality of a law in accordance with Art. 62 Const. with *erga omnes* effect[74] did not compromise the examination of

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68 Cass. 16 April 2010, QPC, No. 10-40.001/002, *Aziz Melki et Sélim Abdeli*, RFDA 2010, 445–449 and AJDA 2010, 1023 note *Manin*.

69 See J. Dutheil de la Rochère, 'La question prioritaire de constitutionnalité et le droit européen', *RTD eur.* 2010, 577–587 (578 et seq.).

70 See CJEU *Melki*, EU:C:2010:363, on which see B. Monnet, 'Le paradoxe apparent d'une question prioritaire de constitutionnalité instrument de l'avènement des rapports de systems', *Revue du droit public* 2013, 1229–1257.

71 On the compromising character of this decision see D. Sarmiento, 'L'arrêt *Melki*: esquisse d'un dialogue des juges constitutionnels et européens sur toile de fond française', *RTD eur.* 2010, 588 (593 et seq.).

72 Cons. const., case No. 2010-605 DC 12 May 2010, *Loi relative à l'ouverture à la concurrence et à la régulation du secteur des jeux d'argents et de hasard en ligne*, thereto B. Mathieu/D. Rousseau, *Les grandes décisions de la question prioritaire de constitutionnalité* (Paris: LGDJ, 2013) 95 et seq.

73 Cons. const., case No. 2010-605 DC 12 May 2010, *Jeux d'argents et de hasard en ligne*.

74 Art. 62 Const.: '(1) A provision declared unconstitutional on the basis of article 61 shall be neither promulgated nor implemented. (2) A provision declared unconstitutional on the basis

conformity with Union law, guaranteed under European law, by the administrative and ordinary courts. The Constitutional Court also stressed that the regulation of the priority of the constitutional question in constitutional law would in no way compromise the competence of the courts to grant the provisional legal protection in urgent cases. Above all, however, it found that the ordinary courts and the administrative courts are not only authorised, but in fact obliged, to refer to both the *Conseil constitutionnel* and also the CJEU in accordance with Art. 267 TFEU. In related proceedings two days later, the *Conseil d'État* concurred.[75] The implementation of these requirements by the *Cour de cassation* has been equally pro-Union: on 29 June 2010, the *Assemblée plenière* decided – in the procedure it had used to refer to the CJEU – to refrain from submitting the *QPC* to the *Conseil constitutionnel* and to leave the French law unapplied on the grounds of its unconformity with Union law.[76]

21. The to-ing and fro-ing between the *Cour de cassation*, CJEU, *Conseil d'État* and *Conseil constitutionnel*, which has been the subject of much comment in scholarship, can be interpreted as an example of the dialogue, repeatedly invoked by the CJEU, between the national courts and the European Court.[77] But it also shows that the coordination of sources of law (above, para. 9), which in the opinion of the French courts is central to the harmonisation of European law, has an institutional equivalent: following the French tradition (above, para. 2), each law has its court and each court has its law, and the increasing entanglement of national law with European provisions is therefore interpreted primarily as a question of coordination between courts with different jurisdictions.

22. The stance of the *Conseil constitutionnel* in favour of European law in 2010 reached a new scale in 2013 when the *Conseil constitutionnel* itself[78] approached

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of article 61-1 shall be repealed as of the publication of the said decision of the Constitutional Council or as of a subsequent date determined by said decision. The Constitutional Council shall determine the conditions and the limits according to which the effects produced by the provision shall be liable to challenge. (3) No appeal shall lie from the decisions of the Constitutional Council. They shall be binding on public authorities and on all administrative authorities and all courts.'

75 C.E. 14 May 2010, *S. Rujovic*, Rec. p. 156; see H. Labayle, 'Question prioritaire de constitutionnalité et question préjudicielle: ordonner le dialogue des juges?', *RFDA* 2010, 659–678 with further references.

76 See P. Remy-Corlay, 'Droit de l'Union européenne et priorité de la question de constitutionnalité de la norm: encore un point de vue', *RTD civ.* 2010, 743 (747 et seq.).

77 On this aspect see D. Simon, 'Les juges et la priorité de la question prioritaire de constitutionnalité: discordance provisoire ou cacophonie durable?', *Rev. crit. DIP* 100 (2011), 1–20; see also F.-X. Millet, 'Le dialogue des juges à l'épreuve de la QPC', *Revue de droit public* 2010, 1729–1750 and Monnet, n. 70 above, esp. 1256.

78 See Cons. const. 12 May 2010.

the CJEU with a question concerning preliminary ruling.[79] Interestingly, it was the *Cour de cassation* that had initially referred to the *QPC* in this case and therefore shown that it was primarily interested in the question of constitutionality. The occasion was a request made by the British authorities for France to extend a European arrest warrant that had already been issued. According to Art. 695-46 of the French *Code de procédure pénale* (Code of Criminal Procedure), any decision regarding an extension of this kind is non-appealable,[80] which both the *Cour de cassation* and the *Conseil constitutionnel* regarded as a breach of essential guarantees of fundamental rights under the French Constitution.[81] Because the provision of the French *Code de procédure pénale* was based on the Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant, the *Conseil constitutionnel* considered itself impeded with respect to deciding on the unconstitutionality of the French provision. It therefore first referred the question of whether the Framework Decision prohibited the possibility of appeal (that is whether the unconstitutionality of the French law is based on the implementation of the European provisions), to the CJEU.[82] Because the CJEU in its preliminary ruling came to the conclusion that the Framework Decision in no way precluded an appeal, stipulating only that the time limits set out in the Framework Decision should be observed in the interest of efficient cooperation in judicial matters,[83] the *Conseil constitutionnel* was subsequently able, on 13 June 2013, to determine the constitutionality of the French provision.[84]

23. In France, this decision of the *Conseil constitutionnel* is seen as a sign of genuine cooperation between the *Conseil constitutionnel* and the CJEU.[85] The question remains, however, to what extent the preliminary ruling can really be seen as a general rule, since the implementation of the European arrest warrant also led to an amendment to the French Constitution: one could argue that Art. 88-2 Const. itself signified that the Constitution conforms to the European

79 See Cons. const., case No. 2013-314 QPC 4 April 2013, *M. Jeremy F*, on which see H. Labayle/R. Mehdi, *RFDA* 2013, 461–476.

80 Art. 695-46(4) *Code de procédure pénale*: 'The ruling of the investigating chamber, from which no appeal lies, is made after ensuring that the application also contains the information provided for by the article 695-13 and after obtaining, where applicable, guarantees in relation to the provisions of article 695-32, within thirty days from the receipt of the application'.

81 Cons. const., case No. 2013-314 QPC 4 April 2013, *M. Jeremy F*, discussed a breach of the guarantee of access to justice as well as to equality before the law.

82 Ibid.

83 See CJEU *Jeremy F*, EU:C:2013:358.

84 See Cons. const., case No. 2013-314 QPC 13 June 2013, *M. Jeremy F*.

85 On the extensive literature see P. Puig, 'Vers un nouveau "dialogue des juges" constitutionnel et européen', *RTD civ.* 2013, 564–572; D. Simon, 'Il y a toujours une première fois. À propos de la décision 2013-314 QPC du Conseil constitutionnel du 4 April 2013', *Europe* 2013, 6–10; X. Magnon, 'La révolution continue: le Conseil constitutionnel est une juridiction … au sens de l'article 267 du traité sur le fonctionnement de l'Union européenne', *RFDC* 2013, 917–940.

requirements.[86] Therefore, the debate is still open whether the solution of 2013 may also apply to legal situations in which the Constitution was not explicitly amended in favour of the implementation of Union law.[87]

4. *Primacy of Application and Secondary Union Law – Especially Directives*

24. Specific questions arise with respect to the integration of secondary Union law into the national hierarchy of legislation. Until 2004, secondary European law was also governed by the provisions of Art. 55 Const. (above, para. 11).[88] This assumption had the consequence that the mere preventive control of the constitutionality of supranational law (above, para. 12) was completely inconsequential with respect to the European secondary legislation. Although the *Conseil constitutionnel* was legitimated to supervise amendments of international agreements and treaties according to Art. 54 Const., it refused to rule on the constitutionality of secondary Union law, as this was enacted after the actual ratification.

25. Based on Art. 88-1 Const., which had been introduced by the constitutional amendment for the Treaty of Maastricht, the *Conseil constitutionnel* in 2004 found a way to examine the constitutionality of national legislation that implements European Directives.[89] From the delegation of legislative powers to the European Union according to Art. 88-1 Const., the *Conseil constitutionnel* inferred that the transposition of Union Directives into national law was also a constitutional requirement (*exigence constitutionnelle*), which may only be set aside by an expressly contrary provision of the Constitution.[90] As a consequence of this decision, the *Conseil constitutionnel* may consider whether the implementation of a Directive is not in an obvious conflict with other constitutional provisions that are the expression of the constitutional identity of France.[91] At the same time, the

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86 See Cons. const., case No. 2013-314 QPC 14 June 2013, *M. Jeremy F.*

87 See C. Geslot, 'Une fois n'est pas coutume, le Conseil constitutionnel saisit la Cour de justice', *Revue de l'Union européenne* 2013, 537–543.

88 Cons. const., case No. 77–90 30 December 1977, *Isoglucose*, Rec. p. 44: '*conséquences d'engagements internationaux souscrits par la France qui sont entrés dans le champ de l'article 55 de la constitution*'.

89 See Cons. const., case No. 2004-496 DC 10 June 2004, *Loi pour la confiance dans l'économie numérique*, Rec. p. 101; thereto M. Gautier/F. Melleray, 'La refus du Conseil constitutionnel d'apprécier la constitutionnalité de disposition législatives transposant une directive communautaire', *AJDA* 2004, 1537–1541; E. Bruce, *Contrôle de constitutionnalité et contrôle de conventionnalité*, available at http://www.droitconstitutionnel.org/congresmtp/textes5/BRUCE2.pdf; for an overview see F. Hamon/M. Troper, n. 9 above, para. 710.

90 See Art. 88-1 Const.: 'The Republic shall participate in the European Union constituted by States which have freely chosen to exercise some of their powers in common by virtue of the Treaty on European Union and of the Treaty on the Functioning of the European Union, as they result from the treaty signed in Lisbon on 13 December, 2007.'

91 See Cons. const., case No. 2006-540 DC 27 July 2006, *Loi relative au droit d'auteur et aux droits voisins dans la société de l'information*, Rec. p. 88; Cons. const., case No. 2006-543 DC

Conseil constitutionnel recognises the primacy of European secondary law over the French statutory law since – as the Court argues – the French Constitution has integrated European law into the French legal order.[92] It seems that this formula is also in keeping with the position of the CJEU, which was expressed in the *Melki et Abdéli* decision in 2010 (above, para. 19). In France, the decision has been interpreted to the effect that the CJEU recognised the possibility of subjecting a Directive to a review of constitutionality, at least indirectly, if it had been transposed into the national law,[93] even though the law itself must be consistent with Union law.[94] By way of this approximation of the positions of the *Conseil constitutionnel* and the CJEU, conflicts of jurisdiction relating to the constitutionality of a law transcribing a Directive can only occur if the French Constitution contains a provision expressing the French constitutional identity which cannot be found in European primary law.[95]

26. The administrative and ordinary courts, particularly the *Cour de cassation* and the *Conseil d'État* have also taken their bearings on the terms of reference of the *Conseil constitutionnel.* Both courts assert the primacy of the Constitution over international law,[96] but for European law, including secondary law, they have swung towards the differentiated position of the *Conseil constitutionnel.*[97] This integration of Union law into the French legal system carried out by the courts is accepted and interpreted as judicial empowerment by the doctrine.[98] For the

30 November 2006, *Loi relative au secteur de l'énergie*, Rec. p. 50; see also Cons. const., case No. 2010-605 12 May 2010, *Loi relative à l'ouverture à la concurrence et à la régulation du secteur des jeux d'argents et de hasard en ligne*; see C. Charpy, 'Le statut constitutionnel du droit communautaire dans la jurisprudence (récente) du Conseil constitutionnel et du Conseil d'État', *RFDC* 2009, 621 (625 et seq.); A. Levade, 'Perspectives: confrontation entre contrôle de conventionnalité et contrôle de constitutionnalité', *AJDA 2011*, 1257 (1260 et seq.); J. Molinier, *Primauté du droit de l'Union européenne*, 1 (para. 80).

92 Cons. const. case No. 2004-505 19 November 2004, *Traité établissant une Constitution pour l'Europe*, Rec. p. 173.

93 See J. Roux, 'La Cour de justice et le contrôle incident de constitutionnalité des directives de l'Union: remarques sur *obiter dictum*', *Rec. Dalloz* 2010, 2524 et seq.; D. Simon, n. 77 above, 1 (18 et seq.).

94 See B. Bertrand, 'La jurisprudence *Simmenthal* dans la force de l'âge. Vers une complétude des compétences du juge national?', *RFDA* 2011, 367 (375 et seq.); also D. Sarmiento, n. 71 above, 588 (597 et seq).

95 On the so-called theory of the Directive as a shield, see F.-X. Millet, *Le contrôle de constitutionnalité des lois de transposition; Etude de droit comparé France-Allemagne* (Paris: l'Harmattan, 2011) 62–64.

96 Cass. Ass. 2 June 2000, *Mlle Fraisse*, Bull. No. 4; C.E. Ass. 30 October 1998, *M. Sarran, M. Levacher et al.*, Rec. p. 368; on both see C. Charpy, n. 91 above, 621 (628–630); for an overview see P.-M. Dupuy/Y. Kerbrat, n. 42 above, 442–443.

97 C.E. Ass. 8 February 2008, *Sté Arcelor Atlantique et Lorraine*, Rec. p. 55.

98 On the relation between the Constitution and the secondary law, see H. Chavrier, 'Droit de l'union et des communautés européennes et le contentieux administratif', *RCA* 2013, paras. 80–85.

application of the law, at any rate, the primacy of both primary and secondary Union law is no longer doubted.[99]

27. With regard to judicial empowerment, it is important to look at another protagonist that has joined in the dialogue hitherto conducted between the French and European judges: in August 2015, the ECHR decided that the refusal of the *Cour de cassation* to refer a *QPC* to the French Constitutional Council was not at odds with the guarantee of a fair trial in Article 6(1) of the Convention. Therefore, the ECtHR found that the application made by *Mr Renard and others* who claimed that their right to a fair trial had been violated by the French civil court, was manifestly ill-founded and hence inadmissible.[100] From a French point of view, this decision shows the dynamic evolution of the judicial dialogue in Europe, which now involves the national courts (in different branches), the constitutional councils of the Member States together with the CJEU and the ECtHR. Each of these courts has to apply its 'own' set of rules whilst respecting the competence of the other courts in their decision-making.

IV. EUROPEAN LEGAL METHODS IN NATIONAL LAW

28. As mentioned before (above, para. 9), the changes in judicial self-understanding associated with the approximation of European laws, particularly in relation to the legislature, are at the heart of the French debate. *Ami Barav's*[101] thesis, published in 1983, took the view that the application of Community law at the time, with its various supervisory powers vis-à-vis the legislature, had released the courts from their national bonds and reinforced their competence with respect to the legislator. *Olivier Dubos* discussed this point of view in more detail, particularly with respect to public law.[102] More recently, *Aline Humbert* described how the judicial function is changing under the influence of supranational law.[103] These monographs proceed from the assumption that with the application of European law, the courts exercise a competence beyond the jurisdiction of the state, thereby accepting a new authority in relation to the other powers of the state and also within the judicial process. This view is also predominant, when scholars comment on the 'constitutionalisation' of French private law (above, para. 4).

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99 See H. Chavrier, n. 98 above, paras. 86–91 with regard to both highest courts.

100 ECHR *Renard and Others* v. *France* (dec.) – 3569/12, 9145/12, 9161/12, decision 25.8.2015 (Sect. V) (with English summary).

101 See A. Barav, *La fonction communautaire du juge national*, Thesis Strasbourg (1983); id., 'La plénitude du juge national en sa qualité de juge communautaire', in S. Rials (ed.), *L'Europe et le droit. Mélanges en hommage à J. Boulouis* (Paris: Dalloz, 1991) 1–20.

102 See O. Dubos, *Les juridictions nationales, juge communautaire.*

103 A. Humbert, n. 38 above.

1. *The Traditional Understanding of Jurisdictional Function*

29. The fundament of the assessment of judicial empowerment lies in the revolutionary tradition of the separation of powers (*séparation des pouvoirs*), according to which the courts are considered exclusively as the enforcer of the legislator's intentions (above, para. 2).[104] This limitation of judicial power is not only an expression of the pre-revolutionary fear of a *gouvernement des juges*[105] (above, para. 8);[106] it was barely questioned until the Constitution of the Fifth Republic (1958).[107]

2. *The National Courts and Their Application of Union Law*

30. This narrow limitation of judicial power has for some time now no longer been applicable to Union law. Since the acknowledgment of the primacy of European law over French statutory law in 1975 and 1989, the *Cour de cassation* and the *Conseil d'État* have turned from the 'mouth of the law' to censors of the legislator, having accepted the competence, in line with the case law of the CJEU, not to apply provisions contrary to Union law (see above, para. 14).

31. A prerequisite for the access of EU law to the national courts is the immediacy (*immédiateté*) of Union law, which the French doctrine distinguishes from the direct effect (*applicabilité, effet direct*) of Union law.[108] The latter is considered an expression of the maximum Union law competence of the national courts (*compétence communautaire maximum*).[109] Immediacy, on the other hand, is interpreted as an expansion of jurisdiction, because the courts no longer comply only with national legislature but also with European treaties and the institutions of supranational organisation.[110] The graduated efficacy of provisions of Union law that ensues from this is delineated in the French doctrine by distinguishing the effect of interpretation (*effet d'interprétation*), the effect of exclusion (*effet d'éviction*) and the effect of reparation (*effet de réparation*).[111]

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104 R. Libchaber, *Les article 4 et 5 du Code civil*, 143–158.

105 On the term see M. Troper, *La théorie du droit, le droit, l'état* (Paris: PUF, 2001) 234–247; further D. de Béchillon, 'Le gouvernement des juges: une question à dissoudre', *Rec. Dalloz* 2002, 973–978.

106 Art. 5 CC: 'Judges are forbidden to decide cases submitted to them by way of general and regulatory provisions.'

107 See Arts. 61(4) and 62(1) Const., which state: 'A provision declared unconstitutional … shall neither be promulgated nor implemented'.

108 See J. Molinier, n. 91 above, para. 22.

109 O. Dubos, n. 102 above, para. 172.

110 See e.g. B. Nabli, *L'exercice des fonctions d'État membre de la Communauté européenne*, paras. 455–463.

111 See O. Dubos, n. 102 above, paras. 127–171; for an overview on the different effects of the Directive see M. Guyomar, 'Le contrôle de la constitutionnalité d'un règlement transposant une directive', *RFDA* 2009, 800–802.

The French doctrine has defined the effect of interpretation, which has the least impact on the national legal system, as the duty of the national courts[112] to interpret all national law in the light of Union law (see below, para. 35).[113] Provisions that are not directly applicable, i.e. Directives, may also have the effect of interpretation within the national law. For the effect of exclusion, however, only immediacy of a provision of Union law is a prerequisite.[114] For this reason, Directives can also be granted the exclusionary effect, provided that this does not result in a legal vacuum (*vide juridique*).[115] Finally, the effect of reparation is present in all directly applicable provisions, including, by way of exception, unimplemented Directives, that involve claims of citizens against the state.[116] If one considers state liability for the lack of implementation of Directives,[117] the traditional subordination of the judiciary to the legislature appears transformed into its opposite by Union law.

32. Particular attention has recently been given to a fourth effect of Union law, the so-called 'effect of substitution' (*effet de substitution*), which in the French doctrine refers to the possibility of pointing out the content of an unimplemented Directive to the legislature and having the Directive applied instead of the national law.[118] In line with the case law of the CJEU, this effect applies primarily to vertical relationships, i.e. particularly in favour of the citizen vis-à-vis the Member State. While the *Cour de cassation* has recognised the vertical effect of the Directive,[119] the *Conseil d'État* has since 1978 (*Cohn-Bendit*) refused in principle to confer such control effects on an unimplemented Directive.[120] It was not until the *Mme Perreux* decision that the *Conseil d'État* swung towards the pro-Union line taken by the *Cour de cassation*.[121] The *Cour de cassation* even follows the CJEU, particularly in labour law,[122] in applying Directives, if and when their provisions are an expression of a primary law requirement, directly

112 See CJEU *Mazzalai*, EU:C:1976:68.

113 For an overview of the jurisprudence of the Council of the State, see H. Chavrier, n. 98 above, paras. 129–139.

114 See – from a German point of view – S. Leible/R. Domröse, in this volume, §8 paras. 48–51 and W.-H. Roth/C. Jopen, in this volume, §13 paras. 12–14.

115 On the position of the Council of the State, see A. Humbert, n. 38 above, paras. 961–973.

116 See O. Dubos, n. 102 above, paras. 172–217.

117 See B. Nabli, n. 110 above, paras. 464–475; the jurisdiction of the administrative court regarding infringements of private law Directives is stressed in Cass. com. of 8 July 2008, Bull. No. 151.

118 See J. Molinier, n. 91 above, paras. 27 and 29.

119 Cass. 1re civ. 23 November 2004, Bull. No. 280; Cass. com. of 7 June 2006, Bull. No. 136.

120 C.E. 30 October 2009, no. 298348 *AJDA* 2009 p. 2385, *Mme Perreux*.

121 See B. Bertrand, n. 94 above, 367–376.

122 See CJEU *Mangold*, EU:C:2005:709; on the influence of European law on French labour law, see J.-Ph. Lhernould, 'L'obligation d'adaptation du droit du travail français à la jurisprudence de la CJUE', *Droit social* 2010, 893–895; E. Dubout, 'L'invocabilité d'éviction des directives dans les litiges horizontaux: le bateau ivre a-t-il sombre?', *RTD eur.* 2010, 277–295.

between private individuals,[123] although it emphasises that this horizontal effect must remain an exception.[124]

33. In view of separation of powers, the subjection of the national courts to the national legislature has been superseded by subordination of the national courts to the CJEU, as the European Court holds the exclusive right to interpretation and rejection for Union law.[125] However, at the national level, this subordination to a non-state court is interpreted as an expansion of the judiciary since the obligations tying the courts through Union law imply new competences of these courts within the state (see above, para. 28).

34. The French courts also have little difficulty in accepting the primacy of Union law (*primauté du droit de l'union*), especially given that it is also accompanied by an expansion of the jurisdiction of the courts vis-à-vis the administration. While the strict understanding of the separation of powers remains in place for purely national law (above, para. 2), the administration can no longer evade the influence of the civil courts in the light of rules induced under Union law.[126]

3. *The (Necessary) Coordination of Sources of Law Originating in National and Union Law*

35. Interpretation in accordance with the requirements of Union law appears in the French legal doctrine as part of the coordination of Union and national provisions incumbent on the national courts.[127] Most difficulties stem from the fact that the 'judge [is] torn between a dual obligation of loyalty' (*déchirure par un double devoir de loyauté*),[128] since the intention of the national legislature on the one hand and the requirements of supranational law on the other must be observed and reconciled.[129] The special nature of the coordination of Union and national law is evident, the first peculiarity being that the primacy of Union law only leads to the prohibition of application not to the invalidity of the national norm. The second special feature of this conflict of norms lies in the fact that also provisions of Union law which cannot form an independent basis for the reasoning are set into force by means of interpretation. This could lead the courts to create rights and obligations of private individuals.[130] In order to avoid this

123 See e.g. Cass. soc. 11 May 2010, Bull. No. 105; Cass. soc. 16 February 2011, Bull. No. 52.
124 See e.g. Cass. soc. 3 July 2012, Bull. No. 205; Cass. soc. 13 March 2013, Bull. No. 41.
125 See O. Dubos, n. 102 above, para. 216 et seq.; J. Molinier, n. 91 above, paras. 2–4 with further references.
126 See D. Ritleng, 'Le juge française se veut bon élève de l'Union', *RTD eur.* 2012, 135–150.
127 O. Dubos, n. 102 above, para. 107 with further references.
128 See B. Nabli, n. 110 above, para. 438.
129 See O. Dubos, n. 102 above, paras. 112–118.
130 See O. Dubos, n. 102 above, paras. 108–110.

excessive outcome, the effect of interpretation (*effet d'interprétation*, see above, para. 31) of Union law must be limited to an objective normative effect. The legal consequences and the limits of the application of the national provision in the light of Union law (*à la lumière du droit de l'union européenne*) are monitored by the *Cour de cassation* with regard to the civil courts.[131]

36. The judicial development of law on the basis of an (unimplemented) Directive does not present particular methodological difficulties since the Directive represents one of the non-statutory sources of law consulted by the judge as part of the two-step application of the law according to Art. 4 CC (see above, para. 8). Since the Directive basically does not have a direct application between private individuals (see above, para. 32 for exceptions), the judge must also select a suitable rule of national law which bears the legal consequence required by the Directive.[132] But this is also not peculiar to the application of Union law, being instead reflected in provisions of national law, which are either, like interpretative laws (*lois interprétatives*),[133] confined to the interpretation of an existing provision, or which, like internal instructions (*circulaires*), have no regulatory content in themselves, but can determine the interpretation of a law.[134]

37. Much attention was paid to the 'law-making' of the *Cour de cassation* on the basis of the Product Liability Directive 1985/374/EEC. This was based not only on the legislative and political importance of this decision, but also on the extensive freedom that the *Cour de cassation* has accorded itself in terms of methodology. The cause behind this act of jurisprudence inspired by the Directive (*jurisprudence inspirée par la directive*) was the belated implementation of the Product Liability Directive, delayed by almost ten years by the French legislature. From the end of the transposition period (30 July 1988) to the entry into force of the newly created Arts. 1386-1 to 1386-18 CC (act of 19 May 1998), the *Cour de cassation* filled the resulting gap between Directive and law by means of judicial decision. A first step was taken with a judgment of the first civil chamber of 9 July 1996, which set out the liability for defective products[135] that had hitherto

131 Recently: Cass. 1re civ. 22 January 2014, *Darty*: 'Vu l'article 7 de la Directive 2005/29/CE du 11 May 2005; ... *casse* ...'.

132 This condition is a consequence of the prohibition stated in Art. 5 CC: see F. Gény, n. 25 above, 147 et seq.; R. Libchaber, n. 104 above, 141–158, esp. 155 et seq.

133 On the practice of interpretational acts (*lois interprétatives*) see L. Bach, n. 10 above, 1 (para. 267 et seq. and para. 324).

134 On the efficacy of this kind of administrative provisions, see E. Picard/G.A. Bermann, n. 4 above, 57 (67).

135 Antecedents are Cass. 1re civ. 11 June 1991, Bull. No. 201; for further references see G. Viney, 'La réception du droit communautaire en droit français et la responsabilité délictuelle et contractuelle', in L. Bach/J.-S- Bergé/M.-L. Niboyet (eds.), *La réception du droit communautaire en droit privé des États membres* (Brussels: Bruylant, 2003) 94 (100).

been missing on the basis of the Directive.[136] In establishing product liability as a separate liability regime that drew on both contractual liability (Art. 1147 CC) and liability in tort (Art. 1384(1) CC), the *Cour de cassation* made a striking break with the hitherto applicable law, which distinguished clearly between contract and tort liability.[137] From the perspectives of both legal policy and legal dogma, there was certainly a need to overcome this dichotomy in the scope of the Directive: in terms of legal policy, the strict separation of the two systems of liability was a hindrance to the substantiation of the claims of the relatives of victims of the blood product scandal. The distinction was also obsolete in terms of legal dogma, because product liability provides grounds for liability that are based solely on the safety of the product. The citation of a combination of two provisions in themselves incompatible under national law therefore demonstrates all the more clearly that national law in this area is merely the shell used to enforce product liability: the purpose of the Directive.[138] Given the complete avoidance of the conditions required by the national legal rule, the line separating *création du droit*, even under the French perception and despite the formal link with a statutory regulation, has probably been crossed here.[139] The cases decided under this precept have in common that the harmful product was placed on the market between the end of the transposition period (30 July 1988) and the entry into force of the implementing law of 19 May 1998. All product damage occurring after this date is subject to the implementing legislation enacted in the meantime, as the *Cour de cassation* has made clear.[140] Judicial development in conformity with Directives appears to be a temporary solution that becomes invalid once the legislature itself acts on the basis of the Directive.

V. THE LIBERATION OF THE JUDICIARY AND THE JURISDICTIONAL DIALOGUE IN EUROPE

38. A summary of the discussion of the French method confirms the assertion of a fundamental change in the judicial function as a result of the necessary coordination between domestic and Union law (above, paras. 9, 28 and 31).

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136 Cass. 1re civ. 9 July 1996, Bull. No. 304.

137 Cass. 1re civ. 28 April 1998, JCP 1998, II 10088: 'Vu les articles 1147 et 1384, alinéa premier, du Code civil, interprétés à la lumière de la Directive CEE n° 85/374 du 24 juillet 1985; Attendu que tout producteur est responsable des dommages causés par un défaut de son produit, tant à l'égard des victimes immédiates que des victimes par ricochet, sans qu'il y ait lieu de distinguer selon qu'elles ont la qualité de partie contractante ou de tiers'.

138 The ruling Cass. 1re civ. 24 January 2006, Bull. No. 33.

139 See P. Sargos, 'Rapport', *JCP* 1998, II 10088, 983: 'interpréter (on serait tenté d'employer l'expression "relire") nos ... articles 1147 et 1384, alinéa premier, du Code civil, à la lumière de la directive?'.

140 See Cass. 1re civ. 15 May 2007, Bull. No. 186.

Above all, however, the obligation to apply Union law with priority and to interpret national law in accordance with Union law opens new options for judicial decision-making and changes the level of power between courts and legislator. The former president of the *Cour de cassation, Guy Canivet*, therefore rightly assesses the development as follows:

> It seems to me in point of fact that the most important contribution of Community law is that it has freed the French civil courts from complete submission to their national legislator, and that it has helped to break the isolation of the judiciary in the national legal system by providing it with new instruments, prospects and goals. For the French judiciary, Community law was a liberator.[141]

39. Judging the legal practice in France from a German perspective, it must be stressed that the legal culture fostered by the CJEU appears to be closer to the French than to the German model. This applies in particular to the dialogue between the various branches of jurisdiction: since the French are accustomed to a system of parallel courts with clearly separate jurisdictions for different legal rules, there is less difficulty in France in recognising the supremacy of the CJEU with respect to European law. An issue that should not be overlooked, however, is that the harmonisation of European law also subjects the French legal system and the French legal culture to major transformations. From this point of view, the long overdue introduction of genuine constitutional control of laws appears to be an attempt to at least partially tie these transformations back to the nation state.

[141] See G. Canivet, 'Le droit communautaire et le juge national', in D. Simon (ed.), *Le droit communautaire et les métamorphoses du droit* (Strasbourg: PUS, 2003) 81 (82).